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In Re:

Determination of Statutory  
License Terms and Rates for  
Certain Digital Subscription  
Transmissions of Sound Recordings

Docket No. 96-5 CARP DSTRA

## ORDER

On May 8, 1998, the Librarian of Congress announced the determination of the rates and terms that apply to certain non-interactive subscription services that publicly perform sound recordings by means of certain digital audio transmissions under the section 114 statutory license. 63 FR 25394 (May 8, 1998). Shortly thereafter, the Recording Industry Association of America, Inc. ("RIAA") filed an appeal with the United States Court of Appeals for the District of Columbia Circuit, challenging these rates and the terms that applied to its function as the agent designated to collect and distribute the royalty fees on behalf of all copyright owners in an appeal.

On May 21, 1999, the court announced its decision to affirm the determination to set the royalty rate for the section 114 compulsory license at 6.5% of gross revenues, but remanded for further consideration the matter of certain terms that were imposed upon the recording industry. Recording Industry Association of America v. Librarian of Congress, 176 F.3d 528 (D.C. Cir. 1999).

As described by the Court, the terms to be reconsidered, §§ 260.2(d), 260.3(d), 260.6(b), and 260.7 of title 37 of the CFR, include terms that "(1) required each performance to be valued equally when royalties are paid to copyright owners, (2) permitted the copyright owners to audit RIAA's practices in handling the royalty fees, (3) specified the nature of the costs that RIAA may deduct from royalties before distribution, and (4) specified how 'unknown copyright owners' should be treated in the distribution of royalties." *Id.* at 531. The Court concluded that "the Librarian has ... authority to impose terms on the RIAA collective," noting that "it is hard to imagine the imposition of a royalty rate without some indication as to how the money collected is to be allocated." *Id.* at 535. The Court also observed that "the Librarian obviously has the power to prescribe the allocations due to those who are not RIAA members." *Id.* However, the Court concluded that there was "no evidence in the record to support the terms imposed on RIAA" because the Copyright Arbitration Royalty Panel ("CARP") in this proceeding "prematurely ended its inquiry by failing to require the imposition of terms on RIAA." *Id.* at 536. The Court therefore remanded the portion of the proceeding relating to these terms for further consideration "so that the parties have a fair opportunity to address [them], and so that the Librarian has the benefit of the parties' views before reaching a judgment." *Id.*

Up to this point, the Copyright Office has not empaneled a CARP to reconsider the terms, choosing instead to give the parties an opportunity to negotiate new terms in light of the court's decision. The Librarian can adopt the parties' proposed terms without convening a CARP, if the parties are able to negotiate such terms, provided that the proposed terms are published in the Federal

Register and no party with an intent to participate in the proceeding files a comment objecting to the proposed terms. See 37 CFR 251.63(b).

Because the parties have not reached an agreement after an extended negotiation period, the Copyright Office will convene a CARP to reconsider the terms imposed under 37 CFR 260.2(d), 260.3(d), 260.6(b), and 260.7. The schedule for the filing of direct cases in this matter, and the 45-day precontroversy discovery period, shall be as follows:

Action	Deadline
Filing of Written Direct Cases	April 17, 2001
Requests for Underlying Documents Related to Written Direct Cases	April 24, 2001
Responses to Requests for Underlying Documents	April 30, 2001
Completion of Document Production	May 1, 2001
Follow-up Requests for Underlying Documents	May 8, 2001
Responses to Follow-up Requests	May 11, 2001
Motions Related to Document Production	May 18, 2001
Production of Documents in Response to Follow-up Requests	May 25, 2001
All Other Motions, Petitions, and Objections	May 31, 2001
Initiation of Arbitration	September 5, 2001

The precontroversy discovery period, as specified by § 251.45(b) of the rules, begins on April 17, 2001, with the filing of written direct cases by each party. Each party in this proceeding must file a written direct case on the date prescribed above. Parties must comply with the form and content of written direct cases as prescribed in § 251.43. Each party to the proceeding must deliver a complete copy of its written direct case to each of the other parties to the proceeding, as well as file a complete copy with the Copyright Office by close of business on April 17, 2001, the first day of the 45-day period.

After the filing of the written direct cases, document production will proceed according to the above-described schedule. Each party may request underlying documents related to each of the other parties' written direct cases by April 24, 2001, and responses to those requests are due by April 30,

2001. Documents which are produced as a result of the requests must be exchanged by May 1, 2001. It is important to note that all initial document requests must be made by the April 24, 2001, deadline. Thus, for example, if one party asserts facts that expressly rely on the results of a particular study that was not included in the written direct case, another party desiring production of that study must make its request by April 24, 2001; otherwise, the party is not entitled to production of the study.

In determining whether a certain document, or category of documents, is discoverable under § 251.45(c)(1), the parties should consult prior discovery rulings of the Library. Specifically, the Library refers the parties to the following: Order in Docket No. 94-3 CARP CD 90-92 (October 30, 1995); Order in Docket No. 94-3 CARP CD 90-92 (November 7, 1995); Order in Docket No. 96-5 CARP DSTRA (November 27, 1996); Order in Docket No. 96-5 CARP DSTRA (January 21, 1997); Order in Docket No. 96-3 CARP SRA (February 7, 1997); Order in Docket No. 94-3 CARP CD 90-92 (August 15, 1997); Order in Docket No. 96-6 CARP NCBRA (December 30, 1997). Copies of these Orders are posted on the Office's web page at [www.loc.gov/copyright/carp](http://www.loc.gov/copyright/carp) under the subheading "Digital Performance Right in Sound Recording."

The precontroversy discovery schedule also establishes deadlines for follow-up discovery requests. Follow-up requests are due by May 8, 2001, and responses to those requests are due by May 11, 2001. Any documentation produced as a result of a follow-up request must be exchanged by May 25, 2001. An example of a follow-up request would be as follows. In the above example, one party expressly relies on the results of a particular study which is not included in its written direct case. As noted above, a party desiring production of that study or survey must make its request by April 24, 2001. If, after receiving a copy of the study, the reviewing party determines that the study heavily relies on the results of a statistical survey, it would be appropriate for that party to make a follow-up request for production of the statistical survey by the May 8, 2001, deadline. Again, failure to make a timely follow-up request would waive that party's right to request production of the survey.

In addition to the deadlines for document requests and production, there are two deadlines for the filing of precontroversy motions. Motions related to document production must be filed by May 18, 2001. Typically, these motions are motions to compel production of requested documents for failure to produce them, but they may also be motions for protective orders. Finally, all other motions, petitions and objections must be filed by May 31, 2001, the final day of the 45-day precontroversy discovery period. These motions, petitions, and objections include, but are not limited to, objections to arbitrators appearing on the arbitrator list under § 251.4, and petitions to dispense with formal hearings under § 251.41(b).

C. Discovery Requests. Due to the time limitations between the procedural steps of the precontroversy discovery schedule, we are requiring that all discovery requests and responses to such requests be served by hand or fax on the party to whom such response or request is directed. Filing of requests and responses with the Copyright Office is neither encouraged nor required.

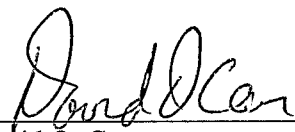
D. Filing and Service of Pleadings. Filing and service of all precontroversy motions, petitions, objections, oppositions, and replies shall be in accordance with 37 CFR 251.44. A pleading is timely filed with the Library if it is delivered to the Copyright Office, Library of Congress, by hand, between 9 a.m. and 5 p.m. at the following address: James Madison Memorial Building, Room 403, 101 Independence Avenue, S.E., Washington, D.C. 20540; or it is delivered to the official address

contained in § 251.1, on or before the filing date. "Delivered to" the Post Office box contained in § 251.1 means that it is in the box on or before the filing date, not that it is in the mail or has arrived at the Southwest Station Post Office for delivery. It is the responsibility of the party submitting a pleading to make sure that the pleading is delivered to the Library on or before the filing deadline.

Likewise, it is the responsibility of the party submitting a pleading to make sure that the pleading is delivered to each party appearing on the official service list to this proceeding. Service must be made on each party by means no slower than overnight express mail on the same day that the pleading is filed with the Library. Any pleading which is not timely filed or timely served on the parties shall, upon motion for good cause of an affected party, be stricken.

E. Initiation of Arbitration. Arbitration proceedings shall be initiated on September 5, 2001, which shall begin the 180-day arbitration period prescribed in 17 U.S.C. 802(e). The schedule of the arbitration proceeding will be established by the CARP after the three arbitrators have been selected.

SO ORDERED.

  
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David O. Carson,  
General Counsel

DATED: February 13, 2001